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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ARNES TIMMONS,

Defendant and Appellant.

F068896

(Super. Ct. No. F13908340)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Rita Barker, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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James Arnes Timmons (defendant) appeals from his convictions for spousal abuse with a prior,<sup>1</sup> robbery, and false imprisonment, all of which arose from a physical altercation with his girlfriend, Lashonda Marshall. He argues there is insufficient evidence in the record to support his robbery conviction. He further argues the sentences on his convictions for spousal abuse and false imprisonment should be stayed pursuant to Penal Code section 654.<sup>2</sup> We agree the sentence on defendant's spousal abuse conviction must be stayed under section 654, but reject his other contentions.

### **FACTS AND PROCEDURAL HISTORY**

Defendant was charged, by a second amended information, with the following offenses: corporal injury to a spouse, a cohabitant, or the mother of his child, with a prior (§ 273.5, subd. (e)(1); count 1)<sup>3</sup>; second degree robbery (§ 211; count 2); and false imprisonment by violence (§ 236; count 3). The information further alleged that defendant had a prior conviction from 2003 that qualified both as a strike under section 667, subdivisions (b) through (i) and as a serious felony within the meaning of section 667, subdivision (a)(1). Defendant pled not guilty to all counts but admitted the allegations relating to the prior conviction. A jury subsequently found defendant guilty on all counts.

At sentencing, the trial court struck the prior strike conviction, denied probation, and sentenced defendant to eight years in state prison. The court imposed a mitigated term of two years on count 2 (§ 211, robbery), the principal count, plus an enhancement of five years pursuant to section 667, subdivision (a). The court noted, "I find that, although this is a robbery, nickel robbery, it certainly—the circumstances of it are clearly

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<sup>1</sup> We interchangeably refer to defendant's conviction for corporal injury to a spouse, cohabitant, or the mother of his children, under Penal Code section 273.5, as a conviction for spousal abuse, since the latter term was used by the trial court.

<sup>2</sup> Subsequent statutory references are to the Penal Code unless otherwise specified.

<sup>3</sup> Section 273.5 was subsequently amended.

on the mitigated end of that kind of behavior, in light of everything that took place here. . . . [¶] . . . Nevertheless, it is a robbery.” As to count 1 (§ 273.5, subd. (e)(1), spousal abuse), the court imposed “an additional one year consecutive, one third the midterm.” Finally, with regard to count 3 (§ 236, false imprisonment), which the court described as “essentially, holding Ms. Marshall briefly in a room,” the court imposed “the midterm [of two years]” to run “concurrent[ly] with the rest of the sentence.” The court summarized its sentencing decision as follows: “Therefore, the total term—I know your wife thinks this is too much, I’m sure you do, but, under the circumstances, this is the best the court can do. I’m ordering you to serve [eight] years in the state prison . . . .”

About a week later, the court recalled the sentence for the purpose of applying section 654 to the sentences imposed on counts 1 and 2, i.e., the spousal abuse and robbery convictions. The court reasoned section 654 precluded multiple punishment for these offenses in light of the possibility the conviction for spousal abuse was premised on a scratch defendant inflicted on Marshall in the course of robbing her by grabbing her phone from her bra. Neither the prosecutor nor the defense objected to the court’s analysis. The court then sentenced defendant to “the midterm” of four years on count 1, and ordered the sentence on count 1 to run concurrently with the sentence on count 2, which remained unchanged. The court concluded, “[n]othing has changed but the total term is seven years not eight like you heard before.”

#### **A. Prosecution Case**

This case started as a domestic dispute between defendant and Marshall. Marshall and defendant had three children together. At the time of the offense, defendant and Marshall were living together as a couple in her apartment.<sup>4</sup>

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<sup>4</sup> Marshall testified that defendant had lived with her and the children in her apartment for the past week or two; Marshall’s son testified that defendant had lived with the family for a “[c]ouple months”; defendant testified that he lived with Marshall for “the past year since we been there at them apartments.”

On July 22 or 23, 2013, defendant and Marshall got into an argument late at night. The argument began when Marshall asked defendant to return her phone. Defendant had been using Marshall's phone, with her permission, to call his cousin; the phone belonged solely to Marshall. At some point Marshall decided she "didn't want them using [her] phone" and asked for it back. Defendant returned her phone and Marshall put it in her bra. The argument then evolved into a dispute about money and other issues. Marshall eventually told defendant she "didn't need him" because she had "a mom." Defendant "got mad" and came up behind Marshall while she was cutting up some items in the kitchen. Defendant "socked" her on the side of the face. The two of them then "started like tussling back and forth." As they were tussling, defendant socked Marshall in the eye. Defendant then grabbed Marshall by her neck and began to choke her, squeezing her throat hard for about a minute.

Marshall testified that while defendant was choking her, he was "digging in [her] bra trying to get [her] phone out." Marshall's 12-year-old son, Robert, who witnessed part of the altercation, testified as follows: "I walked in the kitchen and I seen my dad punch my mom in the eye. And that's when he—that's when, um, my mom she was like crying. That's when he choked her. That's when she turned red. And that's when he looked at her bra and that's when he seen the phone. And he took it."<sup>5</sup> Marshall testified she did not want defendant to take her phone, and "kept like trying to grab [it] so he wouldn't get it." However, defendant was able to snatch the phone, scratching Marshall's chest in the process. Marshall's daughter was also in the kitchen at the time. Marshall stated: "When my daughter pulled his shirt and was saying no, don't do it. He, like, let go. When he got my phone he just let me go. And he took my phone. Automatically he let go."

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<sup>5</sup> Robert is not defendant's biological son.

Directly after getting hold of Marshall's phone, defendant "went and stood in front of the door" and told Marshall she was "not going out." Marshall wanted to go outside, "but he was standing there" preventing her from doing so. Marshall "ran in the kitchen" and "jumped out the [kitchen] window," which was low to the ground. Defendant went out the front door and "socked [Marshall] in the face," specifically on her chin, as they stood in the front yard. Marshall testified, "As soon as he socked me on my chin I like took off running. And [my neighbor's] door was already open so I just ran in her house." Marshall immediately asked to use her neighbor's phone and called 911.<sup>6</sup>

Marshall did not testify about events after that point.<sup>7</sup> However, in the 911 call, a recording of which was played for the jury, Marshall stated defendant "just ran out the gate" and "took my phone." She also said defendant was "on the run" and "just stays wherever."

Marshall's son testified that he had not seen defendant or Marshall's phone since the day of the argument.

Officer David Lambert of the Fresno Police Department investigated the crime. Upon responding to the 911 call, Lambert "observed some swelling on the left side of [Marshall's] face and about a one-inch scratch on her right chest area." Lambert did not locate any suspects on the scene, nor did he recover Marshall's phone.

Defendant testified. He said he and Marshall got into an argument over his failure to contribute money towards outstanding bills. He told Marshall he was going to leave because Marshall was getting loud and aggressive, at which point Marshall hit him and they tussled. He denied choking Marshall or socking her in the face. He left the apartment but returned later that night and stayed with Marshall for three to four hours.

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<sup>6</sup> The 911 call was made on July 22, 2013, just before midnight.

<sup>7</sup> Marshall testified that she had a prior misdemeanor conviction for brandishing a knife and that she and defendant had been involved in prior incidents of domestic violence, which she described.

He had not borrowed Marshall's phone earlier that evening; nor did he attempt to take it during the argument. Indeed, he had never seen Marshall with a cell phone during the entire time they were together, which was close to 16 years. He testified about prior incidents of domestic violence involving the two of them.

The parties stipulated that defendant had three prior convictions for domestic violence based on incidents with Marshall. The parties further stipulated that, in 2003, defendant was convicted of a separate felony.

### **DISCUSSION**

#### ***I. Sufficiency of the Evidence as to Defendant's Robbery Conviction***

We apply the substantial evidence standard of review on appeal, viewing the evidence in the light most favorable to the judgment to determine whether a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Thompson* (2010) 49 Cal.4th 79, 113; *People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) The offense of robbery under section 211 has the following elements: the defendant (1) took possession of property not his own, (2) from another, (3) against that person's will, (4) using force or fear to effect the taking or to prevent resistance to it, and (5) with the specific intent to permanently deprive the owner of his property. (*People v. Lewis* (2008) 43 Cal.4th 415, 464, rejected on another ground by *People v. Black* (2014) 58 Cal.4th 912, 919-920; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) Defendant's contention goes to the fifth element, the specific intent to steal. (*People v. Ford* (1964) 60 Cal.2d 772, 792, overruled on other grounds by *People v. Satchell* (1970) 60 Cal.3d 28, 35-37<sup>8</sup>; *People v. Torres* (1995) 33 Cal.App.4th 37, 50 [specific intent to steal, i.e., to permanently deprive an owner of his property, is required for robbery].)

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<sup>8</sup> *People v. Satchell* was overruled on another ground by *People v. Flood* (1998) 18 Cal.4th 470, 484.

Defendant contends his robbery conviction should be reversed because there is insufficient evidence that he intended to permanently deprive Marshall of her phone. Specifically, he argues “there is *no* evidence that the requisite intent was formed *before or during* the use of force or fear . . . .” (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 166 (*Letner and Tobin*) [for robbery, “[t]he intent to steal must be formed either before or during the commission of the act of force”]; *People v. Yeoman* (2003) 31 Cal.4th 93, 129; *People v. Green* (1980) 27 Cal.3d 1, 53 [the wrongful intent and the act of force “must concur in the sense that the act must be motivated by the intent”], abrogated on another ground by *People v. Martinez* (1999) 20 Cal.4th 225, 239.) If the evidence shows the intent to steal arose after the use of force, the taking will only constitute a theft. (*People v. Burney* (2009) 47 Cal.4th 203, 253; *People v. Lindberg* (2008) 45 Cal.4th 1, 28.) Furthermore, “proof of the existence of a state of mind incompatible with an intent to steal precludes a finding of either theft or robbery.” (*People v. Butler* (1967) 65 Cal.2d 569, 573, overruled on other grounds by *People v. Tufunga* (1999) 21 Cal.4th 935, 956.)

Intent is rarely demonstrated by direct proof but may be inferred from circumstantial evidence. (*People v. Lewis* (2001) 25 Cal.4th 610, 643 [fact finder may deduce criminal intent from “all the facts and circumstances surrounding the crime”]; *In re Michael D.* (2002) 100 Cal.App.4th 115, 126 [substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence]; *People v. Kranhouse* (1968) 265 Cal.App.2d 440, 449 [“[w]hether an act is performed with any particular specific intent is a question of fact for the trier-of-fact” and the trier’s determination will not be disturbed if supported by substantial evidence].)

Defendant testified he told Marshall he was leaving before the two scuffled in the kitchen. Marshall testified that, as the two tussled in the kitchen, defendant punched and choked her while trying to grab her phone. Taken together, this testimony indicates defendant had already decided to leave by the time he forcibly took the phone from

Marshall's bra. Marshall also testified defendant "[a]utomatically" let her go once he got hold of the phone. Defendant subsequently left the apartment without returning the phone or leaving it behind. Marshall's son testified he never saw the phone again after that night. These facts constitute substantial evidence, i.e., evidence that is reasonable, credible, and of solid value, from which the jury could have concluded beyond a reasonable doubt, that defendant formed the intent to steal Marshall's phone either before or during the physical altercation in which he took the phone. (*People v. Lindberg, supra*, 45 Cal.4th at p. 27; see *Letner and Tobin, supra*, 50 Cal.4th at p. 166 [jury could reasonably find, based on defendants' possession of victim's car shortly after she was murdered, that defendants intended to steal her car by killing her, thus committing a robbery and an intentional murder while engaged in a robbery]; *People v. Hughes* (2002) 27 Cal.4th 287, 357-358 [circumstances that the defendant took murdered victim's wallet but left other items of greater value in her home, and that evidence was "slim" regarding *when* intent to steal was formed, did not render unreasonable a finding that defendant committed robbery].)

Defendant argues that the evidence suggests he did not decide to leave with the phone until Marshall headed to a neighbor's apartment to call the police. He contends this indicates any intent to steal was formed after the physical altercation ended. While this is a permissible inference, it is not the only reasonable inference that may be drawn from the evidence. That the evidence allows for the possibility of an " 'after-formed' " intent to steal does not render the evidence legally insufficient as to a contrary finding that defendant previously formed the intent to steal. (*Letner and Tobin, supra*, 50 Cal.4th at p. 166; *People v. Wallace* (2008) 44 Cal.4th 1032, 1077 [existence of possibility of after-formed intent to steal does not render evidence insufficient as to attempted robbery conviction].)

The evidence indicates that defendant used force in wresting Marshall's phone out of her bra and that defendant intended to steal the phone when he forcibly snatched it.

We reject defendant's contention that the evidence was legally insufficient to sustain his robbery conviction.

## ***II. Application of Section 654 to Counts 1 and 2***

Defendant argues that the court erred in imposing concurrent sentences on counts 1 and 2 (spousal abuse and robbery, respectively), after finding that section 654 barred multiple punishment on these counts. The People "concede[] that the trial court, having determined that section 654 applied to counts 1 and 2, mistakenly imposed the sentence on count 1 to run concurrent without subsequently staying the execution of the sentence." The People request modification of "the judgment to stay [defendant's] sentence on count 1." We agree with the parties and stay the sentence on count 1. (See *People v. Jones* (2012) 54 Cal.4th 350, 353 [concurrent sentences precluded by § 654; accepted procedure is to sentence the defendant on each count and stay execution of sentence on the subsidiary count].)

Defendant further argues that it is unclear "whether the court had determined that section 654 applies to all three offenses" rather than simply the offenses of robbery and spousal abuse. He contends that, in any event, section 654 is applicable to all three counts because "all of the offenses—the battery, blocking the door, and the taking of the phone—were merely incidental to, or were the means of accomplishing or facilitating[,] one objective, to obtain the phone." The People respond that the court's section 654 analysis was limited to counts 1 and 2 (spousal abuse and robbery, respectively) given the court's express reference to the possibility that the jury found the spousal abuse was committed in furtherance of the robbery; furthermore, the court discussed only counts 1 and 2 in its analysis. The People further contend that the court's implicit determination that section 654 did not apply to defendant's conviction for false imprisonment is supported by substantial evidence. We agree with the People.

"Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct." (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) The

defendant's intent and objective determine whether the course of conduct is indivisible. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) “ ‘[I]f all of [defendant's] offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.’ ” (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297, quoting *People v. Harrison* (1989) 48 Cal.3d 321, 335.) A trial court's implicit determination that the defendant harbored different objectives in committing multiple offenses, as reflected in its failure to stay a sentence pursuant to section 654, will be upheld on appeal if supported by substantial evidence. (See *People v. Coleman* (1989) 48 Cal.3d 112, 162.)

Here, the court was concerned that the jury could have found defendant guilty of spousal abuse based on the scratch defendant inflicted on Marshall's chest in taking her phone. The court thus reasonably concluded, for purposes of section 654, that the spousal abuse was committed to facilitate the robbery. In contrast, defendant falsely imprisoned Marshall by blocking the door of her apartment *after* he had forcibly taken her phone. The false imprisonment could therefore reasonably have a different purpose from the other offenses, such as preventing Marshall from going outside, alerting the neighbors, or borrowing a phone to call the police. (See, e.g., *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657-1658 [separate punishments for kidnapping and threatening victim were proper under § 654 because in threatening victim, the defendant had distinct objective of dissuading him from reporting kidnapping]; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 193.) The trial court's implicit determination that the false imprisonment offense had a separate and distinct objective is supported by substantial evidence.

Accordingly, we do not disturb defendant's sentence on count 3 (false imprisonment).

**DISPOSITION**

Defendant's sentence on count 1 is stayed. The trial court is directed to amend the abstract of judgment and forward it to the appropriate correctional authorities.

In all other respects, the judgment is affirmed.

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DETJEN, J.

WE CONCUR:

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POOCHIGIAN, Acting P.J.

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FRANSON, J.